

# DOCKET SECTION

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

RECEIVED  
OCT 16 4 40 PM '97  
POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

---

Docket No. R97-1

---

Postal Rate and Fee Changes, 1997

---

**MOTION OF ALLIANCE OF NONPROFIT MAILERS  
AND AMERICAN LIBRARY ASSOCIATION  
TO STAY PROCEEDINGS**

During hearings on October 8, after hearing argument on the propriety of the Postal Service's nonsponsorship and belated sponsorship of library references, Chairman Gleiman invited interested parties to move for relief from the Postal Service's case as improvidently filed. *See* 4 Tr. 1384. Subsequently, in Presiding Officer's Ruling No. R97-1/42, he directed the Postal Service to identify which library references it intended to sponsor with a witness, and directed all interested parties to comment on the appropriate disposition of those library references.

Pursuant to 39 U.S.C. § 3624(c)(2) and Rule 56 of the Commission's Rules of Practice, the Alliance of Nonprofit Mailers ("ANM") and the American Library Association ("ALA") respectfully request that the Commission stay these proceedings until (1) the Postal Service submits a rate request that complies with the Commission's rules (including but not limited

to Rules 31, 53 and 54), and (2) interested parties receive an adequate opportunity to review the material and submit discovery of the Postal Service's refiled case-in-chief.

## **BACKGROUND**

### **A. The Applicable Rules**

This motion seeks to enforce three basic norms of administrative procedure. First, the proponent of change—in this case, the Postal Service—bears the *burden of proof*. 5 U.S.C. § 556(d).<sup>1</sup>

Second, meeting the burden of proof requires reliable, probative and substantial *evidence* on all material issues of fact. 5 U.S.C. § 556(d).

Third, due process entitles parties affected by a proposal to adequate *notice* of the evidence relied on by the proponent of change, and an adequate opportunity to *respond* to that evidence, including the right to “conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d); 5 U.S.C. § 3624(b).

Enforcing these norms is especially critical in postal rate cases. The Postal Service's rate filings rest on enormous masses of statistical, econometric and computerized studies and data—material whose complexity make errors easy and comprehension by third parties difficult. *See Rules of Practice and Procedure for Introducing Studies and Analyses Into Testimony*, 46 Fed. Reg. 45376 (Sept. 11, 1981).

---

<sup>1</sup> The procedural requirements of the Administrative Procedure Act, 5 U.S.C. §§ 556 and 557, apply in this case. 39 U.S.C. § 3624(a).

Further, the Postal Service, to an extent virtually unique among regulated monopolies in the United States, has a monopoly on the relevant data as well. Unlikely rate cases involving railroads, telephone companies, electric utilities, or energy pipelines, postal rate cases involve an entity that is, in many respects, the only one of its kind in the United States. Literally no other firms are available to intervenors as a benchmark for most of the data submitted by the Postal Service.

Moreover, postal rate cases must be adjudicated within ten months. 39 U.S.C. §§ 3624(c)(1), 3641. ANM and ALA are unaware of any other regulated industry in which rate cases of such complexity must be tried and resolved on the merits in so short a period.

To protect parties' due process rights in these circumstances, the Commission has crafted detailed rules for documentation of Postal Service rate requests. In particular:

(1) When filing a rate request, the Postal Service must *simultaneously* file "all of the proposed direct evidence upon which it proposes to rely" to satisfy the statutory ratemaking criteria. Rule 53. This evidence must take the form of either "written testimony" or "documentary exhibits." *Id.*

(2) The supporting testimony and exhibits must be sufficient "fully to inform the parties of the nature, scope, significance and impact of the proposed" rate changes, and to "show that [they] are in the public interest and in accordance with" Title 39. Rule 54(a). To enforce this general standard, Rules 54(b) through (r) require the Postal Service to include an array of specific information in a rate request unless the Service shows "with

particularity" in its request why furnishing such information would be unduly burdensome. Rule 54(a)(2). The required data include information on rates and standards; mail characteristics; physical attributes of mail; specialized service arrangements; total functionalized accrued costs; costs of prior fiscal years; separation, attribution and assignment of costs to individual classes and types of mail; criteria for design of the rate schedule; revenue and volume data; financial statements and related information; billing determinants; continuing and phasing appropriations; and relevant performance goals. Rule 54(b).

(3) Additional supporting detail must be provided for studies and analyses—whether offered by the Postal Service or any other party—including statistical studies and computer analyses. Rule 31(k).

(4) The Postal Service must provide a clear roadmap for other parties to the material supporting the rate request. Each category of information specified by Rule 54(b) through (n) must be supported by workpapers sufficient "to permit independent analysis of each cost component and an independent attribution or assignment of costs to classes and subclasses and the assignment of nonattributed or nonassigned costs to classes and subclasses." Rule 54(o)(2)(i). Workpapers must be "legible," and must include "citations sufficient to enable a reviewer to trace any number used but not derived in the associated testimony *back to published documents or, if not obtained from published documents, to primary data sources.*" Rule 54(o)(3),(4) (emphasis added). Citations shall be "sufficiently detailed"

to enable a reviewer to identify and locate the "specific data used, e.g., by reference to document, page, line, column, etc." *Id.*

(5) The Commission has also adopted rules to prevent the Postal Service from burying key data under boxcars of irrelevant material. Where "relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant," the participant offering the matter into evidence "shall plainly designate the matter offered excluding the immaterial or irrelevant parts." Rule 31(b).

(6) Information supporting the Postal Service's case-in-chief may not be admitted into evidence unless sworn to or affirmed by a sponsoring witness. Rule 31(a). Designation of material as a library reference does not obviate this requirement. Rule 31(b); Presiding Officer's Ruling No. R97-1/20 (Sept. 17, 1997).

(7) Noncompliance with these rules entitles the Commission to reject the Postal Service's rate request or stay the proceeding until satisfactory compliance is achieved. Rules 54(s) and 56.

#### **B. The Postal Service's Noncompliance With The Commission's Rules**

The Commission's rules for documentation of Postal Service rate requests are increasingly honored more in the breach than the observance. In Docket No. MC93-1, *Bulk Small Parcel Service, 1992*, for example, the Postal Service neither provided access to the raw input data underlying its initial market survey nor offered a workable substitute procedure for scrutiny of the data by UPS and OCA. MC93-1 Op. & Rec. Decis. ¶¶ 118-22, 206-

09 (Aug. 25, 1993). On rebuttal, the Postal Service tried to buttress its position with a follow-up demand survey, but declined to provide any sponsoring witness with first-hand knowledge of how the follow-up survey had been designed, administered, answered, or compiled. *Id.* at ¶¶210-12

In Docket No. R94-1, the Commission noted multiple deficiencies in the Postal Service's data. *See, e.g.*, R94-1 Op. & Rec. Decis. ¶¶ 1028-41. The Commission was "unable to replicate the city delivery cost data presented by the Service, because the computer tape provided was not usable and contained numerous errors." *Id.* at ¶ 1039. An apparent threefold increase in nonmachinable parcel post volume between Fiscal Year 1989 and Fiscal Year 1993 ultimately proved to result entirely from a computer error. *Id.* at ¶ 1038. The Postal Service proposed a 34 percent rate increase for second-class in-county mail; only after a storm of protests and motion picture over discovery did the Postal Service reanalyze its data, discover a pervasive error in the IOCS, and withdraw the proposed increase in favor of a proposed 1.5 percent rate *decrease*. *Id.* at ¶ 1037. And the Postal Service filed errata after errata for a study offered in support of a 200 percent proposed increase in business reply mail fees; the Commission ultimately struck the study because of its procedural and technical infirmities. *Id.* at ¶ 1036.

The instant docket marks a watershed in the inadequacy of the Postal Service's supporting documentation. By general consensus, this is the largest and most complex postal rate case ever, with over 40 witnesses and a myriad of novel costing methods offered in the Service's case-in-chief. If

there were ever a case where due process mandated strict compliance with the Commission's rules for documentation of rate requests, this is it. In fact, the incompleteness and opacity of the Postal Service's supporting documentation may be worse than ever.

The Postal Service's litigation tactic of burying critical data and studies in unsponsored library references has received much attention in recent weeks. But this shortcoming is only one of several pervasive problems. These include: (1) failure to file all of the evidence supporting the Postal Service's request simultaneously with the request; (2) failure to make key showings required by Rules 31 and 54; (3) failure to provide workpapers in compliance with Rule 54(o); and (4) failure to distinguish between the relevant supporting data and the massive of irrelevant data produced; as well as (5) reliance on unsponsored data and studies. We discuss each deficiency in turn.

*Failure to file all supporting evidence with request.* The purpose for requiring the Postal Service to file "all the proposed direct evidence upon which it proposes to rely" simultaneously with the Service's rate request (Rule 53) is obvious. Supplementing or revising the Postal Service's case-in-chief after the commencement of the ten month statutory period presents other parties with a moving target, impinging on their already limited window of opportunity to analyze the Postal Service's case and prepare their own testimony.

The Postal Service has flouted this rule continually throughout this case. Errata have followed massive errata. Supplemental testimony has materialized on the eve of hearings, and even during the hearings themselves. *See, e.g.*, Tr. 3423 (USPS witness Nieto). Moreover, on October 14, a week after cross-examination of Postal Service witnesses began, the Service notified other parties that 50 library references—many of which individually run to hundreds of pages of spreadsheets or other data in small type—are now being sponsored into evidence as part of the Service’s case in chief. USPS Response to Presiding Officer’s Ruling No. R97-1/42 (filed Oct. 14, 1997). Supplementation of the Postal Service’s case-in-chief threatens to continue: the Service has suggested that it may offer witnesses for yet *additional* “library references that might be identified subsequently during hearings or otherwise.” *Id.* at 3.

A minimum amount of errors and supplementary filings are almost inevitable in a big case. But there comes a point at which the continual stream of errata and supplemental designations of evidence, coupled with a tight statutory deadline in a case of this magnitude and complexity, work real prejudice on other parties. That point has long since been reached.

***Failure to submit supporting data required by Rules 31 and 54.*** As noted above, Rule 31(k) establishes specific requirements for “all studies and analyses offered in evidence in hearing proceedings or relied upon as support for other evidence.” Rule 31(k)(1) provides that all studies and analysis other than those described in paragraph (k)(2) and (k)(3) must include “a



clear statement of "all relevant assumptions," as well as "a clear statement of the facts and judgments upon which conclusions are based, together with an indication of alternative courses of action considered." None of the library references reviewed by ANM and ALA include a clear statement of the facts or judgments upon which conclusions are based. Not one of them appears in any way to consider any alternative course of action other than the one reported.<sup>2</sup>

Moreover, none of the statistical studies reviewed by ANM and ALA include any description of the assumptions made, much less a comprehensive one. The formulas used for statistical estimates, test statistics, a description of statistical tests and all related computations, and summary descriptions of input data are also missing from the statistical studies or analysis reviewed by the Alliance.

*Failure to provide workpapers required by Rule 54(o).* Equally serious is the Postal Service's noncompliance with the Commission's workpaper requirement. The Postal Service's statement of compliance with Rule 54(o) dismisses the workpaper requirement in two sentences: "This rule requires seven sets of workpapers to be filed with the Request. The required workpapers are supplied with the testimonies of the Postal Service's witnesses." Equating "workpapers" with "testimonies," and filing seven or

---

<sup>2</sup> See, e.g., LR-H-60, LR-H-61, LR-H-62, LR-H-77, LR-H-78, LR-H-105, LR-H-106, LR-H-113, LR-H-130, LR-H-134, and LR-H-195.

more copies of the latter with the Commission, does not begin to satisfy Rule 54(o).

"Workpapers," in the lexicon of Rule 54, are defined as much by their ends as their means. Workpapers must be "legible"; they must identify and locate the "specific data used"—*i.e.*, "by reference to document, page, line, column, etc."; and they must enable a reviewer to "trace any number used but not derived in the associated testimony *back to published documents or, if not obtained from published documents, to primary data sources.*" Rule 54(o)(3), (4) (emphasis added). If the Postal Service fails to provide a clear, specific, step-by-step roadmap from a numerical result back to its ultimate source in published documents or primary data, the Postal Service has not provided valid workpapers under Rule 54.

Many of the numerical values appearing in the Postal Service's testimony and exhibits are unsupported by any workpapers at all. Key data are provided without any indication whatsoever of their provenance. In other instances, the trail of documentation vanishes into thin air only one or two steps back from the end results.<sup>3</sup>

Citations to source documents are often maddeningly vague. The reader is repeatedly steered to library references containing of hundreds of pages of spreadsheets or computer printouts, with no hint offered as to the

---

<sup>3</sup> See, *e.g.*, LR-H-77, which sets forth mail processing piggyback figures relied upon by USPS witnesses Hatfield and Daniels. LR-H-77 is virtually devoid of any citation to the source of any numbers or data included in it. Moreover, the references *to* it by witnesses Hatfield and Daniels invariably cite the document as a whole, not a specific section, page, line or column. See USPS-T-16 (Hatfield) at 15; USPS-T-26 (Hatfield) at 31 & App. I, pp. 6, 10, 37.

page, column or line.<sup>4</sup> In other instances, the derived value appears nowhere in the library reference, but must be derived by arithmetic manipulations from two or more numbers in the library reference. In other instances, the citations are simply incorrect.<sup>5</sup>

Many of the workpapers are incomplete. In many instances, the electronic versions of the library references filed with the Commission lack critical information appearing only in the hard copies. The absence of any warning that the workpapers are incomplete has caused ANM and other participants to waste hours trying to parse them. In other instances, it is the hard copies which are incomplete.

---

<sup>4</sup> LR-H-134, for example, makes continual reference to other Library References without identifying the section or page, much less the line or column from which the data come. *See* LR-H-134 at § 1, pp. 6, 9, 11, 12, 13, 23-28; *id.*, § 2, pp. 7, 10, 12, 13, and 43, etc.

<sup>5</sup> USPS witness Crum's response to NDMS/USPS-T28-11 illustrates all of these problems. As the source for certain costs in LR-H-108, the Postal Service's "workpaper" provided only an unpaginated citation to "LR-H-106," a 49-page document. Asked for precise citations to the page, row and columns in LR-H-106 where the data appeared, the Postal Service conceded that (1) the figures cited in LR-H-108 did not in fact appear in LR-H-106; (2) replicating the figures in LR-H-108 required arithmetic manipulation of data from multiple locations in LR-H-106; and (3) the figures in LR-H-108 were incorrect. 5 Tr. 2223-24.

The documentation underlying USPS witness Wade's analysis of vehicle service drivers provides another example. The documentation included spreadsheets for 50 facilities. The Postal Service's workpapers did not include a printout of the formulas embedded in the spreadsheets. Time consuming analysis of the spreadsheets revealed numerous differences in the algorithms from one spreadsheet to the next, and numerous errors. The Postal Service did not file a new library reference (LR-H-261) correcting the errors until the last day of the discovery period.

Similar problems beset the documentation of TRACS. The library reference originally produced by the Postal Service (LR-H-84) contained a working electronic file for only the first quarter of Base Year 1996; the files for the following three quarters were corrupted and could not run. The Postal Service did not submit corrected files for the latter quarters until October 1st (LR-H-288).

Many of the electronic spreadsheets filed as library references contain electronic links to other spreadsheets or data sources that have been filed (if at all) only as separate library references. Unless the the missing linkages are loaded in the user's computer (and assigned the directory and file names sought by the linking program), the spreadsheets cannot run properly.

Many of the library references (including spreadsheets supporting the volume testimony of witnesses Tolley, Thress and Musgrave) are programmed in mainframe languages such as SAS and SORITEC, and cannot be read on a PC. Other library references are written in decades-old computer languages such as COBOL and FORTRAN. As a practical matter, these workpapers are not "legible" within the meaning of Rule 54(o)(3).<sup>6</sup>

***Boxcar data production.*** The Postal Service has further aggravated the problem by burying the relevant supporting material under a mountain of irrelevant data. To date, the Postal Service has filed nearly 300 library references, many of which individually contain hundreds of pages or millions of bytes of data. It now appears that USPS never had any intention of relying on vast majority of the library references. Many of them are cited nowhere in the Postal Service's testimony; and the Service has proposed to

---

<sup>6</sup> The programs underlying USPS witness Degen's analysis of Cost Segment 3, set forth in Library Reference LR-H-218, are a good example. As the Commission is aware, Mr. Degen's methodology marks a radical departure from the Postal Service's prior method of distributing these costs. His analysis, however, was run on an IBM mainframe version of the SAS statistical program. The overwhelming majority of the SAS user community has migrated to the PC platform, and Mr. Degen's SAS programs could not be run on the PC version of SAS without time-consuming manual reprogramming. Two solid days of questioning of Mr. Degen's staff were required simply to replicate his results.

sponsor only about 50, or 15 percent, of them. Of the first 100 library references, the Postal Service has seen fit to sponsor only *one*. USPS Response to Presiding Officer's Ruling No. R97-1/42 (Oct. 14, 1997).

***Reliance on unsponsored data and studies.*** As several participants have noted, much of the Postal Service's case rests on data and inputs from library references that no Postal Service witness has yet offered to sponsor under oath. *See, e.g.,* OCA Response to Notice of Inquiry No. 1 (Oct. 3, 1997) at Attachment A. These unsponsored data are not evidence, and may not be relied upon in support of the Postal Service's case. Rule 31(b); *accord*, Reply Brief of the USPS in Docket No. MC96-1 (March 4, 1996) at 17-19 & n. 8 (arguing that Commission may not consider OCA cost analysis based on unsponsored OCA library reference).

The Postal Service's failure to offer witnesses to sponsor these data under oath cannot be excused on the theory that they are information that an expert could reasonably rely upon as the basis for an opinion. The Commission has rejected this approach—and properly so. *See* MC93-1 Op. & Rec. Decis. ¶ 211 (lack of a sponsoring witness "made it inappropriate to admit the follow-up survey results into the record to establish the truth of matters that the survey questions themselves address, such as quantification of BSPS volume").

The unsponsored data are not collateral or cumulative support for an expert's opinion: they are used, directly or indirectly, as inputs to Postal Service cost studies, and thus are being offered for their truth. Moreover,

the Commission's elaborate requirements for documentation of the Postal Service's supporting data—and the errors in those data chronically unearthed in rate cases—flatly belie the notion that any competent expert would reasonably rely on Postal Service data without careful independent scrutiny.

Reliance on the “business record” rule is likewise misplaced. The data and studies underlying Postal Service rate requests do not, by and large, have an independent business role that gives the Postal Service a stake in their accuracy. The data are, with few exceptions, created for use in litigation.

If the Postal Service's logic were accepted, the Postal Service's direct testimony could be a single sentence by a single witness: “I find, based on the Postal Service's underlying studies and data prepared specifically to prove this point, that its cost estimates and rate proposals are reasonable.” The rest of the case could be unsworn library references. There would be no point to rate cases or the Commission itself. The requirement that parties offer witnesses to sponsor testimony and exhibits is a hollow one if parties can bootstrap critical data and studies into evidence by offering witnesses who attest to the conclusion drawn from the data and studies, but not to their underlying inputs, assumptions and methodology. A *meaningful* opportunity for cross-examination must include the latter as well as the former.<sup>7</sup>

---

<sup>7</sup> See *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 429 (D.C. Cir. 1993); *Newsweek, inc. v. USPS*, 663 F.2d 1186 (2d Cir. 1971), *aff'd*, *Nat'l Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810 (1983).

The Postal Service's, apparently recognizing the problematic nature of its unsponsored library references, has belatedly offered to sponsor about 15 percent of them. USPS Response to Presiding Officer's Ruling No. R97-1/42. This response is too little and too late. The majority of library references remain unsponsored. Even in sponsored library references, much of the information relies on inputs from *other* unsponsored studies or compilations that remain unsponsored.<sup>8</sup> Like the 500 hats of Bartholomew Cubbins, each layer of unsponsored data rests on still others.

Moreover, the Postal Service's sponsorship announcements have come far too late to allow meaningful cross-examination. The newly-sponsored library references are comparable in length and complexity to the case-in-chief of a good sized rate case only a few years ago. Meaningful scrutiny of this dizzying array of material would take several months. If these items had been filed and identified as witness-sponsored exhibits when USPS filed its case-in-chief, as USPS should have done, parties would in fact have received the necessary time. Requiring parties to assimilate this morass of material—without further discovery—in the week left before October 23, when sponsoring witnesses are scheduled to take the stand, would be a caricature of due process.

---

<sup>8</sup> For example, LR-H-106 at pages II-8, III-6, IV-6, V-1, V-2, VI-3, VI-4, VI-5, VI-6 and VI-7 relies upon LR-H-126. LR-H-77 at pages II-8B [203], II-9 [204] and II-16 [211] relies upon LR-H-127. LR-H-77 is in turn widely relied upon by other Library References, e.g., LR-H-134 relies upon LR-H-77 at many points including Sec. 8, p.35, Sec.9, p. 10, Sec. 9, p. 35, Sec. 11, p. 10, and Sec. 11, p. n10.

**C. Stay Of This Proceeding Is The Minimum Appropriate Remedy.**

USPS's massive resistance to the Commission's rules is serious enough to warrant summary rejection of request. Rule 56. ANM does not ask for this remedy, however. We request instead that the Commission exercise its authority under 39 U.S.C. § 3624(c)(2) and Rule 54(s) to stay this proceeding, and toll the statutory deadline for a decision, until the USPS files an amended request that complies fully with the Commission's evidentiary rules, and interested parties have had a full opportunity to engage in discovery of the Postal Service's amended filing.

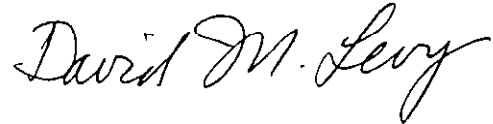
The Commission is at a crossroads. There will never be a more propitious time to enforce compliance with the Commission's rules. Inflation is low; the Postal Service is far more prosperous than anticipated when this rate case was filed; and no one can seriously contend that several months of delay will jeopardize the Service's financial survival.

If the Commission blinks from enforcing its rules now, it may as well shut its doors for good. The Postal Service, while continuing to file "testimony" and "exhibits," will bury the crucial details of its cases in unsworn library references and uncharted workpapers. Constrained by the ten-month statutory deadline and the Postal Service's chokehold on most cost



data, the Commission and the mailing public will simply have to accept the Postal Service's cost studies at face value. Rate cases, while preserving the outward form of adversarial litigation, will be little more than show trials.

Respectfully submitted,

A handwritten signature in black ink, reading "David M. Levy". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Joel T. Thomas  
11326 Dockside Circle  
Reston, VA 20191  
(703) 475-4646

*Counsel for the Alliance of  
Nonprofit Mailers*

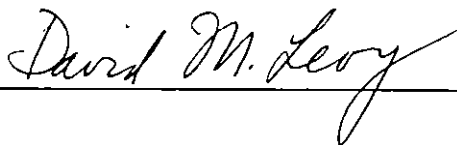
David M. Levy  
SIDLEY & AUSTIN  
1722 Eye Street, N.W.  
Washington, DC 20006-3704  
(202) 736-8214

*Counsel for the Alliance of  
Nonprofit Mailers and the  
American Library Association*

October 16, 1997

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

  
\_\_\_\_\_

October 16, 1997